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No. 01-1519

IN THE
Supreme Court of the United States

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LOIS E. ADAMS, *ET AL.*,
*Petitioners*,

v.

GEORGE W. BUSH, *ET AL.*
*Respondents*

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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# PETITIONERS' REPLY TO OPPOSITION OF RESPONDENT PRESIDENT BUSH

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## SUMMARY OF REPLY

Respondent's Opposition to the Petition for Writ of Certiorari shows that the Writ should be granted; the Court may then summarily reverse and remand this case for reinstatement of Petitioners' appeal in the court below.

## REPLY TO STATEMENT [OF FACTS]

Respondent proffers two erroneous and unsubstantiated "facts" of this case, which will be addressed in Petitioners' reply to Respondent's arguments.

## REPLY TO RESPONDENT'S ARGUMENTS

### Regarding Question One:

Respondent's argument on the primary question at issue–as to *which* court has jurisdiction over the appeal underlying this Petition for Writ of Certiorari ("Pet." at i)–is found on pages 7-9 of his Opposition ("Opp."). His argument, generally, is that the three-judge district court's denial of Petitioners' motion for relief under Federal Rule of Civil Procedure 60(b) (Appendix ("App.") B) was a "denial of an injunction" under 28 U.S.C. § 1253, so appeal from that decision is to this Court and not to the court of appeals.

Respondent never provides any compelling analysis or illustration of the *factual* component of the assertion, however, showing that denial of Petitioners' Rule 60(b) motion was necessarily also denial of an injunction. At most, he asserts that it "reaffirmed" the earlier denial of all relief (Opp. at 6). This is a highly abstract correlation, because the issue before the court in the Rule 60(b) motion concerned due process of law claims challenging procedure in this case, while the earlier, March 20, 2000 decision concerned equal protection and Guarantee Clause claims challenging the constitutionality of apportionments. It is also abstract because, as shown in the Petition, granting the motion would not have resulted in granting any injunction–it wouldn't even have made such a grant more likely than not. The

Respondent's abstract correlations cannot satisfy 28 U.S.C. § 1253, defines the conditions for direct appeal to this Court in clear and concrete terms.

Respondent cites eleven cases (Opp. at 8 & n.4) in which, he says, this Court "has already rejected" arguments "similar" to Petitioners' arguments. In fact, *none* of those cases constitute rejections of arguments "similar" to Petitioners' arguments. In all the cited cases, the three-judge district courts had dismissed the plaintiffs' complaints–*i.e.*, had not denied any Rule 60(b) motions (or even denied motions for reconsideration)–and the dismissals were *on the merits*. *See Shaw v. Reno*, 509 U.S. 630, 637-38 (1993); *Brown v. Thompson*, 462 U.S. 835, 841 (1983); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 430 (1977); *Carter v. Stanton*, 405 U.S. 669, 670 (1972); *Lynch v. Household Finance Corp*, 405 U.S. 538, 541 n.5 (1972); *see also Lefkovits v. State Bd. of Elections*, 424 U.S. 901 (1976), affirming 400 F.Supp. 1005, 1005-16 (N.D. Ill. 1975) (three judge court); *Fincher v. Scott*, 411 U.S. 961 (1973), affirming 352 F.Supp. 117, 117-20 (M.D.N.C. 1972); *Beacham v. Braterman*, 396 U.S. 12 (1969), affirming 300 F.Supp. 182, 182-84 (S.D.Fla. 1969); *Sullivan v. Alabama State Bar*, 394 U.S. 812 (1969), affirming 295 F.Supp. 1216, 1222 (M.D.Ala. 1969); *Shames v. Nebraska*, 323 F.Supp. 1321, 1336 (D.Neb. 1971), *aff'd*, 408 U.S. 901 (1972). Thus, in all these cases, dismissal necessarily entailed "denying all *relief* sought" in the complaints, *Lynch, supra*, 405 U.S. at 451 n.5 (emphasis added), which included injunctions, so appeal was properly taken to the Supreme Court.

In both *Lynch* and in *Oldroyd v. Kugler*, 461 F.2d 535 (3d Cir. 1972), the order appealed from did not "explicitly deny[] injunctions," *id.* at 539, but the court properly noted that this was not "controlling," since "dismissal of the suit *on the merits* is sufficient to effect a judgment appealable to the Supreme Court under 28 U.S.C. § 1253." *Id.* (emphasis added; footnote omitted). The same result explains the appeal in *Lynch, supra*, because dismissal on the merits includes dismissal of the relief–injunctions–sought. It might also be noted that the court of appeals in *Oldroyd* proceeded to

address appellant's arguments that the three-judge district court erred in denying declaratory relief on the grounds that appellants/plaintiffs had not presented a "substantial federal question." The court of appeals concluded that the three-judge district court was in error in this finding, *id.* at 539-40, so the court of appeals was fully competent to address even the constitutional claims presented in the first instance in the case, so long as that process was not a review of a grant or denial of an injunction.

Conversely, the decision giving rise to the appeal underlying the instant Petition was *not* on–and did not address–the merits of Petitioners/Plaintiffs' constitutional claims which lodged their case before a three-judge district court in the first place.[1] It was a decision on separate claims which did not concern apportionments of representation and it did not entail decision on any demand for injunctions. The only "relief" at issue in Petitioners' Rule 60(b) motion was whether the judgment entered on March 20, 2000 would continue to hang over Petitioners' heads (and this relief hung upon Petitioners' claims to due process of law, not on equal protection or on the Guarantee Clause of the Constitution).

Thus, Respondent errs in saying that, "[f]or the same reasons that this Court had jurisdiction over" Petitioner's appeal in year 2000, "this Court–and not the court of appeals–also had jurisdiction over the appeal from denial of petitioner's Rule 60(b) motion" (Opp. at 8). The order appealed from in 2000 was an order dismissing Petitioners' *claims* challenging the constitutionality of present apportionments (*see* App. H). Conversely, the order underlying the instant appeal/Petition did not dismiss any *claims* nor, hence, requests for injunctions *based upon* those claims. The order underlying the instant appeal/Petition

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[1] Respondent makes a stern point that Petitioners "do not dispute" that this action was properly before a three-judge district court (Opp. at 6-7). Indeed, *Petitioners* applied for such a court (*see* App. F) and Respondent *opposed* that application (*see* Record), his counsel *denying* the very fact on which Respondent now hangs his hat. So much for consistent assertion of the law.

denied Petitioners' request for *relief from a judgment*, period. Had the request been granted, no injunction would have followed. Had the request been granted, Petitioners might have sought to amend their Complaint before proceeding to *delete* their requests for injunctions. There is no telling *what* would or could have followed any other judgment on Petitioners' Rule 60(b) motion.

Likewise, Petitioners' Rule 60(b) motion was not a motion to "reconsider" or readdress the merits of Petitioners' claims or arguments as to the constitutionality of apportionments of representation. The merits of those claims were simply not "on the table" in the Rule 60(b) motion, nor could they be. So denial of the Rule 60(b) motion can not be taken as re-denial of something already and independently "denied."

By way of comparison, one might anticipate a situation in which a person who should have been but was not drawn into an apportionment suit finds herself bound by some aspect of judgment in that suit (whatever it is), so she might seek relief from the judgment, *not* so she might pursue the same relief already decided but to seek entirely different relief. How could denying her motion amount to denying relief she is not seeking? How could granting her motion amount to granting relief which she has not applied for yet? The only "relief" at issue in her motion is her "relief" from the earlier judgment.

Finally, if Respondent's assertions were credible, almost *no* decision of a three-judge district court would not be directly appealable to this Court, since the relief sought in any case is placed at stake *abstractly* in almost *every* possible decision taken during the course of litigation. A decision limiting evidence can make it impossible for a plaintiff to prevail, so could amount to premature "denial" of an injunction. A converse decision barring certain defenses or taking judicial notice of certain facts might mean a defendant's goose is inevitably to be cooked, so he could appeal against this premature "grant" of injunctions.

Shall this Court open the door to *any* appeal, simply because the aggrieved party can say that, in the abstract,

looking down the line from the decision at issue, an injunction may or may not be granted or denied and be, therefore, abstractly traceable back to the decision appealed from? No; a far wiser course is to stick to the Court's settled jurisprudence and construe 28 U.S.C.§ 1253 to apply *only* to decisions which actually and/or necessarily by *direct* effect grant or deny injunctions. *See Shames*, *supra*, 323 F.Supp. at 1336 n.22 (construing *Goldstein v. Cox*, 396 U.S. 471 (1968)).

In the instant case, as a matter of fact, the decision giving rise to the appeal underlying this Petition neither granted nor denied any injunction. Therefore, 28 U.S.C. § 1253 does not confer appellate jurisdiction on this Court and the court of appeal has jurisdiction under 28 U.S.C. § 1291.

Regarding Question Two:

The essence of Respondent's argument on the second question before the Court is that, if the court of appeals lacked jurisdiction over this appeal, it need not have transferred the appeal to this Court under 28 U.S.C. § 1631 because it was not "in the interest of justice." It's not exactly clear, however, *why* Respondent thinks it's not "in the interest of justice" that Petitioners' appeal be reviewed.

On one hand, Respondent seems to suggest that the fundamental issue in the underlying appeal has already been decided by this Court (Opp. at 9-10). This suggestion is based on the procedural history of the case and it overlooks one clear fact (a fact which Respondent himself has never refuted) and one apparent problem: the merits of this case have never been addressed on the record and this Court's summary orders in 2000 in the earlier appeal are not as clear in their scope and meaning as Respondent suggests.

Insofar as Petitioners' did refer to this fact in their original appeal from the three-judge district court's March 20, 2000 judgment, this Court's decisions affirming that judgment and denying Petitioners' (then, Appellants') motion to rehear (reconsider) are not completely clear. As Petitioners have previously argued, it appears that this Court only decided whether to affirm the March 20, 2000 judgment of the three-

judge district court, and nothing more. But this then leaves undecided Petitioners' due process arguments at issue in their Rule 60(b) motion. In the end, only this Court can say for sure what it intended.

Did this Court address Petitioners' arguments that their claims, arguments, and evidence were wholly ignored and that their case was decided on the basis of antithetical claims and arguments presented in a separate case? Did this Court decide that it was *not* a violation of due process for Petitioners' claims to be dismissed because the claims in *another* case were defective? Did this Court decide that Petitioners were *not* entitled to evaluation of *their own*, actual claims, arguments, and evidence? Or did this Court decide that Petitioners were *not* entitled to due process of law?

If the answers to the questions in the previous paragraph are affirmative, then perhaps the issue in the underlying appeal *has* been addressed. But if the answers are not in the affirmative, then it *has not.*

Respondent also provides another suggestion, wholly independent of the first, as to why transfer of the appeal might not be appropriate. He suggests that this Court should "take a peek at the merits" of this case (Opp. at 10, quoting *Phillips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999)), whereupon it will find that Petitioners "lack standing" to seek the relief they seek and that their equal protection and Guarantee Clause claims "lack merit."

This suggestion fails, however, because Respondent has failed to show that his premises are accurate. Instead, he proffers absurd and unsupportable "facts" of the case.

For instance, in his Statement [of facts], Respondent asserts that Petitioners' equal protection claim was that the Constitution requires Congress "either to grant statehood to the District of Columbia or to retrocede it to an existing State" (Opp. at 2). Nothing in the Record cited by Respondent supports such a ludicrous claim and the plain language of the Complaint (App. E) belies Respondent's distortions.

Petitioners' equal protection claim was nothing more than the garden variety claim that the government must treat

Petitioners in substantially the same manner as it has treated all other people who are or ever were under an identical or substantively identical power of that government, or show cause why any differential treatment is either mandated under law or is a necessary and unavoidable consequence of a compelling governmental interest (*see* App. E at ¶¶ 66-69 and "relief" section at ¶¶ A.1 & B.1-2; *see also* App. F at 3 & 5-6). Neither "statehood" nor "retrocession" were or could be elements or aspects of this claim.

For further instance, Respondent offers an argument concerning relief sought against Respondent, referring to an injunction requiring the President "to perform a non-ministerial task." (Opp. at 10 n.6). But nowhere in Petitioners' Complaint is there a request for an injunction that the President *do anything*. The only injunction sought against the President is *prohitory*–that he *not do* certain things (*see* App. E, "relief" section at ¶¶ C.1a-1b (the President "shall not" take certain action); *see also* App. F at 2).[2]

We shouldn't mince words; Respondents' assertions are merely tactical ploys to paint Petitioners as political outcasts or nutcases who don't *deserve* a fair hearing in court. How is justice served by this situation? What "justice" results from erasing a case? What justice results from avoiding addressing sound legal claims? The answer is "none."

The net fact is that Plaintiffs have presented justiciable claims and demanded only negative or prohibitory injunctions (*see* App. F), so their case is not a "sure loser" in any court

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[2] There's no authority for the proposition that the President is above the law and may do whatever he wishes without fear of judicial restraint or prohibition, when what he does violates the Constitution, so there is no known authority for the proposition that a court may not issue a *prohibitory* injunction to prohibit the President from enforcing an unconstitutional act or from doing something which violates the Constitution. For the purposes of this litigation, moreover, Petitioners would hypothesize that no court could tell the President to *do* anything, even if only "ministerial," *see, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 824-27 (1992) (Scalia, J., concurring), but such an injunction is irrelevant to this case.

which is willing to grapple with the claims, arguments, and evidence presented, and since it's not a "sure loser," the claims at issue here should be reviewed, *somewhere*. *See Phillips, supra*, 173 F.3d at 611; *see also In re Dep't of Energy Stripper Well Litig.*, 206 F.3d 1345, 1354 (10th Cir.), *cert. denied*, 531 U.S. 924 (2000) (transfer under 28 U.S.C. § 1631 denied because the court to which movants sought transfer had previously signified its intention to "finally dispose of" the claims to be transferred *and* movants had "ample opportunity to pursue" their claims in "the proper forum"–neither of which condition pertains to the instant appeal).

The record in this case contains adequate and unrefuted evidence that Petitioners' original claims, arguments, and evidence were wholly *ignored* by the three-judge district court (*see* App. J), and the record contains adequate and unrefuted evidence supporting Petitioners' original claims and arguments are substantial and present pressing federal constitutional challenges to existing apportionments (*see* App. F). Therefore, upon a fair review of that record, *see Campbell v. Office of pers. Mgmt.*, 694 F.2d 305, 309 n.6 (3d Cir. 1982), it cannot be said that Petitioners' "could not prevail" on their Rule 60(b) motion–which is actually at issue in this Petition (nor could it be said that they could not prevail in their original case–which is not at issue in this Petition). Therefore, if the court of appeals indeed *lacks* jurisdiction over the appeal underlying the present Petition, the appeal should be *transferred* to this Court under 28 U.S.C. § 1631.

## CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, it was an error for the court of appeals below to dismiss Petitioners' appeal. The Court should issue a Writ of Certiorari, summarily reverse the court of appeals, and remand the matter for reinstatement of Petitioners' appeal from the decision of the district court denying Petitioners' Rule 60(b) motion.

In the alternative, if the court of appeals below lacks jurisdiction over Petitioners' appeal from the decision of the

district court denying Petitioners' Rule 60(b) motion, this case should be sent back to the court of appeals with instructions that Petitioners' appeal be transferred to *this* Court under 28 U.S.C. § 1631 and 28 U.S.C. § 1253.

Respectfully submitted,
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Petitioners' Counsel of Record